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CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD SUAREZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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October 22, 1987

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER IT IS NECESSARY IN ORDER TO SUFFICIENTLY PRESERVE AN ISSUE FOR APPELLATE REVIEW IN A FEDERAL CRIMINAL CASE THAT TRIAL COUNSEL IN THE HEAT OF A CRIMINAL TRIAL CITE RULES AND CASE LAW TO THE TRIAL JUDGE, AT TIME OF OBJECTING TO EVIDENCE, WHERE GROUNDS ARE MADE ABUNDANTLY CLEAR TO THE TRIAL COURT?

2. WHETHER ERRORS OF CONSTITUTIONAL DIMENSION, EVEN IF INADEQUATELY ARGUED IN THE TRIAL COURT, ARE REQUIRED UNDER THE PLAIN ERROR RULE TO BE CONSIDERED ON APPEAL?

3. WHETHER THE ADMISSION INTO EVIDENCE IN THE GOVERNMENT'S CASE IN CHIEF, OF INCRIMINATORY ADMISSIONS BY A DEFENDANT TO HIS FORMER COUNSEL AND TO A GOVERNMENT AGENT IN ATTENDANCE DURING PLEA BARGAINING PROCEEDINGS, VIOLATES KERCHEVAL V. UNITED STATES, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927)?

4. WHETHER SIMMONS V. UNITED STATES, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) PRECLUDES A FINDING OF WAIVER

OF CONSTITUTIONAL RIGHTS BY A DEFENDANT WHO SEEKS TO VINDICATE HIS SIXTH AMENDMENT RIGHT TO GO TO TRIAL, AFTER INADEQUATE ADVICE OF COUNSEL TO PLEAD GUILTY, BY EXERCISING HIS STATUTORY RIGHT TO WITHDRAW HIS GUILTY PLEA, REQUIRING IPSO FACTO THAT THE COURT INQUIRE AS TO CONVERSATIONS BETWEEN DEFENDANT AND HIS FORMER COUNSEL WHICH LED TO THE ERRONEOUS ENTRY OF THE FORMER PLEA?

PARTIES TO THE PROCEEDING

The caption of this case contains the name of all parties.

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OPINION BELOW

The Opinion of the lower court, appended hereto in its entirety, is not yet reported.

JURISDICTION

The Opinion of the Eleventh Circuit Court of Appeals affirming Petitioner's conviction in the Southern District of Florida, was entered on July 2, 1987 (App. 1). A timely Petition for Rehearing in the Court of Appeals was denied on August 25, 1987 (App. 2).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254(1) and Supreme Court Rule 20.1 and 20.4.

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const., Amendment V:

> No person shall...be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law....

2. U.S. Const., Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner was charged by indictment in the Southern District of Florida with constructive possession and illegal transfer of firearms and conspiracy in regard thereto. Petitioner's defense was that he had been engaged through a Co-Defendant, Bina Souers, by one John Kodadek, a Registered Government Agent; that he had been asked to pretend to be "Ralph", an intermediary in an illegal firearms transaction; that he had never joined any criminal conspiracy but had only offered to assist the Government in an on-going "sting" operation at the request of Kodadek and Souers. SUAREZ was originally

represented by an attorney Feldman, who advised SUAREZ to plead guilty which he did. The lower court found in proceedings under Rule 11 of the Federal Rules of Criminal Procedure to set aside that plea bargain that Feldman had inadequately represented critical matters to Petitioner, wrongfully inducing him to enter his plea and that accordingly the trial judge would allow the plea to be withdrawn.

During the course of the pretrial proceedings to change the plea, new defense counsel for SUAREZ, who had replaced Feldman and who was seeking to set aside SUAREZ' earlier guilty plea, did not make any special point to suggest that the testimony then being elicited in

the pretrial change of plea proceeding was not to be used against SUAREZ at trial. However, Rule 410 of the Federal Rules of Evidence (App. 3) and Rule 11(e)(6) of the Federal Rules of Criminal Procedure (App. 4) clearly compelled such result, i.e. that any statements admitted during plea or withdrawal of plea proceedings not be admitted against the criminal defendant in his subsequent trial (See Rule 410, Notes of Advisory Committee, App. 3 hereto).

Petitioner's Motion to Withdraw his former Guilty Plea, made through new counsel, asserted that Feldman had inadequately represented critical matters to this Defendant in order to induce him to initially plead guilty. Inherent,

therefore, in the Motion Seeking to Set Aside the Guilty Plea and to obtain the right to go to trial, was the requirement that the Court inquire as to what had been said between Feldman and the Petitioner in order to initially induce him to plead guilty.

At no time did new counsel for Petitioner seeking to set aside the initial guilty plea consider that SUAREZ was being put to a Hobson's choice under which, in order to exercise his statutory right to withdraw his plea, he was thereby waiving for purposes of trial his attorney-client privilege as well as his privilege not to take the stand to rebut unconstitutionally admitted evidence. Nor did the trial court warn SUAREZ or

new counsel that anything said during the change of plea hearing would automatically be admissible at trial.

Shockingly, however, in the Government's case in chief, Feldman was called to the stand, to the surprise of defense counsel, as the third witness in the Government's case in chief, eliciting the following objection as to the admissibility of Feldman's testimony at trial:

"Defense Counsel: Although we recognize a privilege being waived for purposes of a client understanding the consequences of his plea, he did not waive it for purpose of testimony at trial.

* * *

"My recollection is that we would be waiving our privileges for purposes of that hearing. [the change of plea hearing] (V-6)

The Government immediately

replied: "It doesn't make any difference". (V-6) The Court then indicated an acute and definite awareness that trial counsel was arguing that the waiver had been a limited waiver, i.e. only for the withdrawal of plea proceeding; overruled the objection and then pointedly added:

"The Court: If I am wrong of course we have a fine Court of Appeals if it need be that can set me straight." (V-6)

The trial court thus clearly understood the point being raised, namely that the Feldman testimony albeit admissible in the change of plea proceeding, was not admissible as part of the Government's case in chief. Nonetheless, while announcing (supra)

that if wrong, counsel could pursue review of that ruling on appeal, the objection was specifically overruled. The Court felt that by seeking a change of plea calling for the attorney-client testimony at the pretrial change of plea proceeding, the Defendant unconditionally waived his right to subsequently object to the admissibility of any of Feldman's testimony at trial, even as evidence in chief.

Trial counsel, having been shocked by the unprecedented calling of Defendant's own former counsel in the case as the Government's third witness in the Government's case in chief, did not have in hand at that time a citation to Rule 410 of the Federal Rules of Evidence

(App. 3) or to Rule 11(e)(6) of the Federal Rules of Criminal Procedure (App. 4).

Nor did trial counsel then have available a copy of Kercheval (App. 5) nor Simmons v. United States, 390 U.S. 377 (88 S.Ct. 967, 19 L.Ed. 2d 1247) (1968) (App. 6).

The cited rules specifically limit admissibility of pretrial admissions to the change of plea proceedings themselves. Kercheval establishes the constitutional and precedental basis for that rule.

Simmons holds that where one seeks to establish at a pretrial hearing, facts necessary to vindicate one constitutional right [in Simmons a Fourth

Amended Claim], this should not be held to constitute a waiver for purposes of trial of another equally valid constitutional right [A Fifth Amendment right]. This, the Simmons court finds to be an intolerable tension between two constitutional rights, i.e. requiring that one would have to be surrendered in order to assert the other. The Simmons logic is said to apply to the pretrial plea-bargaining process in all of its facets. (See Notes of Advisory Committee, Rule 410, App. 3 hereto).

Petitioner, under the express reservation of right to appeal above-quoted, did as he had been invited to do by the trial court and sought to raise

before the Eleventh Circuit the Rule 410, Rule 11(e)(6), Kercheval and Simmons arguments. He was held, however, by the Circuit Court below to have irrevocably waived the right to argue those matters on appeal because trial counsel, after having clearly and specifically announced his objection and the proper grounds, had inadequately and without sufficient particularity argued the objection. Counsel had not cited the applicable rules by number and case law by name, at the precise moment that the Government sought, with no forewarning, to introduce the Feldman testimony.

The Eleventh Circuit in the Opinion here sought to be reviewed has thus held that it could not review on

appeal of a criminal conviction, Petitioner's objection to the introduction of the Feldman testimony during the Government's case in chief, solely because Petitioner's trial counsel had inadequately presented the issue below for purposes of appellate review.

The Eleventh Circuit went on to hold that notwithstanding that the error sought to be reviewed was error of constitutional dimension it could not even review that matter on appeal even under the "plain error" rule.

Thus, Petitioner has been left without any appellate review by the Court of Appeals,[1] of a conviction which stems

---

[1] Despite the trial judge's assurance that his ruling was reviewable on appeal -- an assurance which obviously brought an immediate court-ordered halt to any further effort to footnote Petitioner's objection.

directly from the erroneous admission of his former attorney's highly prejudicial testimony that he (SUAREZ) admitted to his former counsel (Feldman) that he was the "real Ralph".

In short, Petitioner's own counsel convicted him, by telling the jury that his only defense [having admitted his factual participation in the misconduct charged] was false.

Petitioner's critical evidentiary issue was admitted by the Eleventh Circuit Panel opinion to be "an interesting and difficult" one but it was one which the Panel "chose not to address". (App. 1)

Petitioner contends that the decision sought to be reviewed is in

direct conflict with decisions of other Federal Courts of Appeal on Points I and II here raised; that it is in equally direct conflict with decisions of this Court (Kercheval and Simmons) on Points III and IV here raised.

The requirement of citing rules and case law in the heat of battle in a criminal case as a condition precedent to being heard on appeal as to objections to critical testimony, has so far departed from the accepted and usual course of criminal proceedings in the Federal District Courts as to call for an exercise of this Court's power of supervision.

The Sixth Amendment right to withdraw a guilty plea wrongfully induced

and go to trial before a jury cannot be saddled with "waivers" specifically prohibited by Rule 410, Kercheval and Simmons.

REASONS FOR GRANTING THE WRIT

Four reasons dictate that the writ should be granted in this case:

1. Trial counsel in the heat of battle in a Federal criminal case has been given a new, patently unreasonable burden: citing rules by number and case law by name as a condition of being heard on appeal.

2. An Appellate Panel has elected to impose not only such an unreasonable and burdensome trial load on criminal defense counsel, as a sine qua non for appellate review in the Courts of

Appeal but it has, in addition and directly in the fact of uniform precedent from other Circuits, improperly narrowed the "plain error" rule to exclude questions involving an acknowledged Hobson's choice between Sixth and Fifth Amendment rights.

3. The Court of Appeals in the case sought to be reviewed has blatantly ignored the clear language and intent of Rule 410, Federal Rules of Evidence; Rule 11(e)(6), Federal Rules of Criminal Procedure and the rule of law long ago posited by this Court in Kercheval.

4. The Court of Appeals has failed to apply Simmons to a pretrial change of plea proceeding where the same Hobson's choice -- incriminatory

testimony required by law to be introduced in order to initially vindicate the pretrial constitutional rights of a criminal defendant -- is here precisely involved.

Petitioner submits that this case virtually cries out for review in this Court. It is an unprecedent departure from the accepted course of proceeding in the Federal Courts and will constitute a vicious trap for all trial lawyers on Federal criminal cases who do not literally bring Westlaw and an experienced Research Aide with them to trial.

A. Requirement of Citing Rules, by Number, and Case Law as Condition Precedent to Appellate Review of

Admissibility of Evidence in a Federal Criminal Case.

The decision below is in direct conflict with Blair v. United States, 401 F.2d 381, 391 (D.C. Cir. 1968) which holds:

"We think in making her objection counsel said enough to bring the Miranda problem to the court's attention. She did everything but cite Miranda by name and, barring interruption, she might have done that too."

* * *

"Where the question is as fundamental as admissibility in a criminal trial of a pretrial statement by a defendant, counsel may properly assume that even a brief objection presenting the essence of his contention will receive the considered attention of the trial judge without need for a detailed particularization and citations." (Emphasis supplied)

In United States v. Check, 582

F.2d 668, 676 (2nd Cir. 1978), it was decided that a general objection which a trial judge understands is sufficient to entitle a criminal defendant to review on appeal, the Second Circuit pointing out that it would be "unreasonable for us to hold that...defense counsel, in the heat of a hotly contested criminal trial" is required to present his objection with any greater particularity.

In interpreting the Federal Rules of Evidence to require citation of authority beyond an objection to specific evidence on specific grounds, the Opinion below is in conflict with Sprynczatyk v. General Motors Corporation, 771 F.2d 1112, 1118 (8th Cir. 1985) which holds that it is only necessary to obtain a de-

finitive ruling on an objection to specific evidence. To require more would be to require formal exceptions; those, however, have been abolished.

B. Failure to Reach the Kercheval-Simmons Issue, on Appeal, Violates the "Plain Error" Rule.

In United States v. Shue, 766 F.2d 1122 (7th Cir. 1985), it was held that even though defense counsel "did not give a specific basis for his objection" the Appellate Court should determine "errors of constitutional dimension" under the "plain error" rule.

Post-arrest statements allegedly made by a defendant are deemed to be matters as to which the "plain error" rule is clearly applicable. United

States v. Vaughn, 443 F.2d 92, 94-95 (2nd Cir. 1971); United States v. Lopez, 575 F.2d 681, 685 (9th Cir. 1978).

The Eleventh Circuit case at bar is in conflict with all of the foregoing authorities --D.C., Second, Seventh, Eighth and Ninth Circuits -- in refusing to reach errors of constitutional dimension under the "plain error" rule.

C. The Entire Thrust of Rule 410, Which is an Outgrowth of Kercheval, is to Exclude Everything Which Occurs During Withdrawn Plea Proceedings; To Hold Otherwise Virtually Destroys Kercheval.

As set forth in the Notes of Advisory Committee on Proposed Rules, Rule 410 (App. 3), to allow the admission

of matters which arose only in withdrawn plea proceedings would effectively:

"...set at naught the allowance of withdrawal of a guilty plea and place the accused in a dilemma utterly inconsistent with the decision to award him a trial".

The Hobson's choice, itself acknowledged by the Eleventh Circuit Panel in the Opinion below, was initially discussed in this very context in People v. Spidilary, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961) likewise cited in the Notes of Advisory Committee on Proposed Rule, Rule 410. (App. 3)

It is obvious that in seeking to withdraw a former plea of guilty based on inadequate explanation by counsel, both the Defendant and his former counsel are compelled to take the stand in order to

resolve the Motion itself. To thereafter permit the testimony, admitted for the limited purposes of change of plea, to be introduced by the Government in the Government's case in chief, clearly places the accused in an unconstitutionally impermissible dilemma utterly inconsistent with the decision to permit him to vindicate his Sixth Amendment rights and go to trial.

D. The Instant Case is One Which Raises a Pure Application of Simmons and, as Such, the Simmons Rule Should Have Been Summarily Applied.

In Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) it was obvious to the Defendant there that in moving to exclude

inadmissible testimony in a pretrial hearing, the Defendant would have to take the stand for the limited purpose of establishing his standing to object to the evidence. It was held, therefore, that because the requirement of taking the stand was inherent in the presentation of the pretrial Motion, and done only to vindicate the Defendant's Fourth Amendment rights there, this did not constitute a waiver of the Defendant's Fifth Amendment right not to have that testimony admitted at trial as part of the Government's evidence in chief.

In the instant case, the same inherent ingredient was present when SUAREZ made the decision, through new counsel, to try to withdraw a guilty plea

which had been improperly imposed upon him by inadequate predecessor counsel.

It is obvious that once SUAREZ urged by Motion that his former counsel had inadequately discussed the scope and effect of a plea of guilty, both he and his former counsel would have to be called to the stand to each discuss what had been said by one to the other as an inducement to the Defendant's earlier plea of guilty.

To suggest in the face of Rule 410 and Kercheval that there was no similar "Hobson's choice" facing the Defendant here and to ignore Simmons, as did the Eleventh Circuit below, is to raise a distinction without a difference.

In the instant case, SUAREZ was

seeking in a pre-trial hearing to vindicate his Sixth Amendment rights rather than his Fourth Amendment rights. That is the only thing which distinguishes this case from Simmons.

Simmons should be extended to a pretrial withdrawal of plea proceeding and should be held by this Court, consistent with Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure, to limit admissibility of former counsel's testimony, as well as anything else which occurred during the plea or change-of-plea proceedings, to the pretrial stage of the case only.

To do otherwise is to convict a Defendant, as here, on the self-serving

testimony or opinion of his own former lawyer that he was guilty -- a dangerous precedent for all who need counsel in a criminal case and one which is especially inappropriate when the trial judge, in allowing the withdrawal of plea, has found that former counsel was incompetent in inducing the guilty plea in the first instance.

* * *

CONCLUSION

Petitioner respectfully submits that this case warrants issuance of this Court's Writ of Certiorari on the various grounds and for the reasons above set forth.

STANLEY JAY BARTEL, ESQUIRE
Attorney for Petitioner

Miami, Florida
October 22, 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit was served, by U.S. Mail, First Class, postage prepaid, upon the Solicitor General, Dept. of Justice, Washington, D.C. 20530 (in triplicate) with courtesy copy served upon Southern District of Florida, the U. S. Attorney, 155 South Miami Avenue, Suite 700, Miami, Florida 33130, this 22nd day of October, 1987.

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UNITED STATES of America,

Plaintiff-Appellee,

vs.

Richard SUAREZ, Defendant-Appellant,

No. 85-5143

United States Court of Appeals

Eleventh Circuit.

July 2, 1987.

Defendant was convicted of conspiracy to possess and transfer illegal firearms and possession and transfer of weapons before the United States District Court for the Southern District of Florida, No. 86-61-CR-WMH, Wm. M. Hoeveler, J.,

and defendant appealed. The Court of Appeals, Anderson, Circuit Judge, held that once attorney testified at hearing to withdraw defendant's guilty plea, pursuant to defendant's waiver of attorney-client privilege, attorney-client privilege could not bar attorney's testimony on same subject at trial.

Affirmed.

1. Witnesses 198(1)

Attorney-client privilege is not favored evidentiary concept in law since it serves to obscure truth, and it should be construed as narrowly as is consistent with its purpose.

2. Witnesses 198(1), 219(3)

Purpose of attorney-client privi-

lege is to promote freedom of consultation between client and lawyer by eliminating fear of subsequent compelled legal disclosure of confidential communications, but at point where attorney-client communications are no longer confidential, where there has been disclosure of privileged communications, there is no justification for retaining privilege, so that once waived, attorney-client privilege cannot be reasserted.

3. Witnesses 219(3)

Once attorney testified at hearing to withdraw defendant's guilty plea, after defendant waived attorney-client privilege, attorney-client

privilege could not bar attorney's testimony on same subject at trial of defendant for conspiracy to possess and transfer illegal firearms and possession and transfer of weapons in violation of federal firearms and tax laws; attorney's testimony at trial was well within scope of his testimony at plea withdrawal which was already in public domain pursuant to initial waiver of privilege.

4. Criminal Law 1036.2

Failure of defendant to raise in district court argument that he was faced with "an undeniable tension" between exercising statutory right to withdraw his guilty plea and foregoing his attorney-client privi-

lege and privilege against self-incrimination did not preserve issue for appeal. Fed.Rules Evid.Rules, 103 note, 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Florida.

Before VANCE, and ANDERSON, Circuit Judges, and WISDOM,* Senior Circuit Judge.

ANDERSON, Circuit Judge:

On this appeal, we address the question whether the attorney-client privilege can be resurrected at trial after the attorney has testified at a pretrial evidentiary hearing with his former client's consent and pursuant

to an express waiver. We conclude, upon the facts presented here, that the privilege had been waived and thus there was no error in allowing the attorney to testify at trial.

I. FACTS

In 1981, a federal grand jury in the Southern District of Florida indicted Richard Suarez, a/k/a "Ralph", Gary Souers and Bina Souers on charges of conspiracy to possess and transfer illegal firearms and possession and transfer of weapons, in violation of federal firearms and tax laws. "Ralph" was still unidentified at the time the Souers negotiated and consummated a plea bargain. At some point thereafter,

Bina Souers provided information to the government which led to the arrest of Richard Suarez for his role as "Ralph" in the conspiracy. Suarez was represented by Attorney Kenneth Feldman, and pled guilty to one count of the indictment on the advice of his attorney. Two months later, Suarez retained an additional attorney, Rebekah H. Poston, to represent him. On October 25, 1982, seven months after his plea of guilty, Suarez moved to withdraw his plea of guilty pursuant to Fed.R.Crim.P. 32(d) and requested an evidentiary hearing.

As grounds in support of the motion, Suarez alleged that Attorney Feldman

had inadequately disclosed to him the nature and consequences of his guilty plea and had made misrepresentations to him.

The trial court held an evidentiary hearing to determine whether the guilty plea should be withdrawn. Suarez testified at the hearing that although he was innocent of the charges, he had pled guilty to one of the charges on the misrepresentation and incompetent advice of Attorney Feldman. Feldman allegedly told Suarez that after he pled guilty, Suarez would have a chance to explain to the court his contention that he had been involved in the case in what he believed to be an undercover

government agent capacity. Feldman told Suarez that the charges would then be dismissed. Since the defendant was raising the issue of his attorney's misrepresentations, the court, the government, and new defense counsel all agreed that it was essential that Feldman testify at the evidentiary hearing. At that hearing, Suarez expressly waived his attorney-client privilege to permit Feldman's testimony.

Feldman testified at the hearing that Suarez had initially denied any involvement with the charged acts, including meetings and conversations with a government agent. Even when Feldman informed Suarez that the

voice on a government tape of a conversation sounded like his own, Suarez continued to deny any involvement in the meetings, conversations and activities underlying the charged offenses. Feldman testified that after he gave Suarez the tape, and when the compounding evidence increasingly indicated that appellant had participated in crucial meetings and conversations, Feldman and Suarez considered the possibilities of entering a guilty plea. Feldman stressed that the first time he became aware of Suarez' purported undercover role in the case was after Suarez entered his guilty plea, when Feldman received a copy of Suarez'

letter to his probation officer claiming his innocence.

The trial court found that although Suarez' plea was valid under Fed.R.Crim.P. 11, he may not have been completely aware of the direct consequences of his plea. Accordingly, pursuant to Fed.R.Crim.P. 32(d), the court ordered that the guilty plea be set aside. Subsequently, Suarez was tried before a jury.

At trial, the goverment called Feldman to testify as a witness during the government's case in chief. Defense counsel vigorously objected to Feldman's testimony, on the ground that the waiver of

attorney-client privilege was only for purposes of the change of plea proceeding. However, the trial judge ruled that the attorney-client privilege had been waived as to the matters to which Feldman had testified at the prior evidentiary hearing, and the court allowed Feldman to testify.

Feldman's testimony at trial paralleled, but was more limited than, his testimony at the evidentiary hearing. In particular, he testifed that Suarez initially came to him denying any involvement in the accused activities, but that Suarez' attitude completely changed" when he heard the tape containing his voice.

Suarez was convicted by a jury on October 5, 1984, and was sentenced to two years imprisonment on each of three counts, to run concurrently with each other. As for the other counts, he received a suspended sentence, probation, and an order to do community service. On appeal, Suarez' primary argument is that the admission into evidence of Feldman's testimony was in violation of the attorney-client privilege and Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). We affirm.

II. DISCUSSION

At trial, Suarez' attorney, Poston, vigorously objected to Feldman's

testimony on the ground that such testimony violated Suarez' attorney-client privilege. The trial judge ruled that the waiver of the privilege at the evidentiary hearing constituted a waiver for all purposes. The trial court's conclusion was well-founded.

[1-3] We begin by noting that the privilege is not a favored evidentiary concept in the law since it serves to obscure the truth, and it should be construed as narrowly as is consistent with its purpose. Teachers Insurance & Annuity Ass'n of American v. Shamrock Broadcasting Co., 521 F.Supp. 638, 641 (S.D.N.Y.1981). The purpose of the

attorney-client privilege is to promote freedom of consultation between client and lawyer by eliminating the fear of subsequent compelled legal disclosure of confidential communications. International Tel. & Tel. Corp. v. United Tel. Co. of Florida, 60 F.R.D. 177 (M.D.Fla. 1973), aff'd, 550 F.2d 287 (5th Cir. 1977). However, at the point where attorney-client communications are no longer confidential, i.e., where there has been a disclosure of a privileged communication, there is no

justification for retaining the privilege. See United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th

Cir. 1975); In re Weiss, 596 F.2d 1185 (4th Cir. 1979); Teachers Insurance, 521 F.Supp. at 641; United States v. Aronoff, 466 F.Supp. 855, 862 (S.D.N.Y. 1979); United States v. Mierzwicki, 500 F.Supp. 1331, 1334 (D.Md. 1980). For that reason, it has long been held that once waived, the attorney-client privilege cannot be reasserted. See, e.g., United States v. Blackburn, 446 F.2d 1089, 1091 (5th Cir. 1971), cert. denied, 404 U.S. 1017, 92 S.Ct. 679, 30 L.Ed.2d 665 (1972); Drimmer v. Appleton, 628 F.Supp. 1249 (S.D.N.Y. 1986); United States v. Krasnov, 143 F.Supp. 184, 190-91 (E.D.Penn. 1956), aff'd, 355 U.S. 5, 78 S.Ct. 38, 2

L.Ed.2d 22 (1957); Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4 D.C.A. 1982); 8 Wignore, Evidence §2328 at 638 (McNaughton rev. 1961) ("A waiver at one stage of a trial should be final for all further stages..."). Once Feldman testified at the hearing to withdraw the guilty plea, the attorney-client privilege could not bar his testimony on the same subject at trial. Feldman's testimony at trial was well within the scope of his testimony at the plea withdrawal, which was already in the public domain pursuant to the waiver of the privilege. Thus, we agree with the district court that Feldman's trial

testimony was not a violation of Suarez' attorney-client privilege.

Appellant also argues on appeal that this case is controlled by the rationale expressed in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). In Simmons, a criminal defendant, in order to pursue a claim to suppress certain evidence (i.e., a suitcase in which incriminating evidence was found) which he alleged was seized in violation of his Fourth Amendment rights, was required to testify at a pretrial hearing to establish standing, i.e., his ownership of the suitcase. His admission of ownership was admitted against him at trial.

The Supreme Court recognized the danger that a defendant who knew that his testimony could be used against him would sometimes be deterred from presenting the testimonial proof neceessary to establish standing to assert a Fourth Amendment claim. And if a defendant did testify in order to pursue his Fourth Amendment rights, the admissibility of such testimony would result in effective waiver of his privilege against self-incrimination. The Court labeled this dilemma "an undeniable tension" between constitutional rights and found it "intolerable that one constitutional right should have to be surrendered in order to assert

another." Simmons, 390 U.S. at 394, 88 S.Ct. at 976. The Court solved the dilemma by barring the use at trial of the defendant's testimony at the suppression hearing. Appellant argues on appeal that his case is like Simmons in that he is being put to a Hobson's choice: in order to exercise his statutory right to withdraw his plea (which he argues implicates both his constitutional right to a jury trial and his right to effective assistance of counsel), he must forego his attorney-client privilege and his privilege against self-incrimination.

(4) Appellant's contention is an interesting and difficult one, but we

need not address it in this case. After a careful review of the record, we have concluded that Suarez did not present to the district court the Simmons rationale as a basis for his objection to Feldman's testimony. He argued only that use of the testimony would violate his attorney-client privilege. Fed.R.Evid. 103(a) provides that error may not be predicated upon a ruling which admits evidence unless the specific ground for the objection is made clear. The nature of the error must be "called to the attention of the judge, so as to alert him to the proper course of action and enable opposing counsel to take proper corrective measures."

Fed.R.Evid. 103, advisory committee note to subdivision (a). Since we cannot conclude that the Simmons problem, if error at all, represents plain error under the particular circumstances here, see Fed.R.Evid. 103(d), we find that the Simmons issue has not been preserved for appeal.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FOOTNOTES

* Honorable John Minor Wisdom, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

1. Suarez asserts several other grounds for reversal. After careful examination, we conclude that Suarez' other claims are without merit and warrant no discussion.

2. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

3. We need not address the issue of whether a limited waiver of the privilege is possible, since in any event Suarez' counsel did not attempt to waive the attorney-client privilege for purposes of the evidentiary hearing only. Indeed, attorney Poston spoke in broad terms at the hearing - "Obviously, we have waived our privilege."

4. Suarez cannot argue on the facts of this case that Feldman's trial testimony was unrelated to his testimony at the previous hearing and thus beyond the scope of the waiver.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-5143

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

versus

RICHARD SUAREZ,

Defendant/Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(August 25, 1987)

BEFORE: VANCE and ANDERSON, Circuit Judges, and WISDOM, Senior Circuit Judge.

The petition(s) for rehearing filed by appellant is Denied.

FEDERAL RULES OF EVIDENCE

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state proce-

dure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant

under oath, on the record and in the presence of counsel.

(As amended Pub.L. 94-149, §1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

Withdrawn pleas of guilty were held inadmissible in federal prosecutions in Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L.Ed. 1009 (1927). The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the

accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in People v. Spitaleri, 9 N.Y.2d 168, 212 NY.S.2d 53, 173 N.E.2d 35 (1961), reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against

admissibility are collected in Annot., 86 A.L.R.2d 326.

Pleas of nolo contendere are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the nolo plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, 15 U.S.C. § 16(a), recognizing the inconclusive and compromise nature of judgments based on nolo pleas. General Electric Co. v. City of San Antonio, 334 F.2d 480

(5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), cert. denied 376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659; Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., 18 A.L.R.2d 1287, 1314.

Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p.543.

"Effective criminal law administration in many localities would

hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also People v. Hamilton, 60 Cal.2d 105, 32 Cal. Rptr. 4, 383 P.2d 412 (1963), discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the

effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in California Evidence Code § 1153.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11. Pleas

* * *

(e) Plea Agreement Procedure.

* * *

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was

later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

ROBERT KERCHEVAL, Petitioner,

v.

UNITED STATES OF AMERICA.

* * *

ON WRIT of Certiorari to the Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming a judgment of the District Court for the Western District of Arkansas convicting defendant of using the mails to defraud.

Reversed.

See same case below, 12 F.(2d) 904.

The facts are stated in the opinion.

* * *

Mr. Justice Butler delivered the opinion of the court:

Petitioner was indicted in the District Court for the Western District of Arkansas under §215 of the Criminal Code for using the mails to defraud. He pleaded guilty, and thereupon the court sentenced him to the penitentiary for three years. Afterwards he filed a petition alleging that he was induced so to plead by the promise of one of the prosecuting attorneys to recommend to the court that he be punished by sentence of three months in jail and by fine of $1,000.00, and by the statement of such attorney that the court

would impose that sentence. The petition asserted that the sentence given was excessive and prayed to have it set aside and the punishment alleged to have been promised substituted. The United States denied the allegations of the petition. After hearing evidence on the issue, the court declined so to change the sentence, but, on petitioner's motion, set aside the judgment and allowed him to withdraw his plea of guilty and to plead not guilty. At the trial the court, against objection by petitioner, permitted the prosecution as a part of its case in chief to put in evidence a certified copy of the plea of guilty. The petitioner

in defense introduced the court's order setting aside the sentence and granting leave to withdraw that plea. Then both sides gave evidence as to matters considered by the court in setting aside the conviction. The court charged the jury: "The plea of guilty is introduced as evidence by the government...If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in

connection with the other evidence in the case. If...you find that he was deceived, that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case." The jury returned a verdict of guilty, and the court sentenced petitioner to the penitentiary for three years. The Circuit Court of Appeals affirmed the judgment. 12 F.(2d) 904. It said (P. 907): "In the motion made by the defendant to set aside the judgment he admits that he had pleaded guilty.

The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilt, and the court so instructed the jury. The defendant probably knew better than any one else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of." The case is here on

certiorari. 273 U.S. 685, ante, 839, 47 Sup. Ct. Rep. 244.

In support of the rulings below, the United States cites Com. v. Ervine, 8 Dana, 30; People v. Jacobs, 165 App. Div. 721, 151 N.Y. Supp. 522; State v. Carta, 90 Conn. 79, L.R.A. 1916E, 634, 96 Atl. 411; People v. Boyd, 67 Cal. App. 292, 302, 227 Pac. 783; and People v. Steinmetz, 240 N.Y. 411, 148 N.E. 597. The arguments for admissibility to be gleaned from these cases are that the introduction of the withdrawn plea shows conduct inconsistent with the claim of innocence at the trial; that the plea is a

statement of guilt having the same effect as if made out of court; that it is received on the principle which permits a confession of the accused in a lower court to be shown against him at his trial in the higher; that it is not received as conclusive, and, like an extra-judicial confession is not sufficient without other evidence of the corpus delicti. It is sometimes likened to prior testimony of the defendant making in favor of the prosecution.

Other decisions support the petitioner's contention that a plea of guilty withdrawn by leave of court is not admissible on the trial of the issue arising on the substituted plea

390 U.S. 377

Thomas Earl SIMMONS et al., Petitioners,

v.

UNITED STATES.

No. 55

Argued Jan 15, 1968.

Decided March 18, 1968.

* * *

Mr. Justice HARLAN delivered the

opinion of the Court.

This case presents issues arising out of the petitioners' trial and conviction in the United States District Court for the Northern District of Illinois for the armed robbery of a federally insured savings and loan association.

* * *

Finally it is contended that it was reversible error to allow the Government to use against Garrett on the issue of guilt the testimony given by him upon his unsuccessful motion to suppress as evidence the suitcase seized from Mrs. Mahon's basement and its contents. That

testimony established that Garrett was the owner of the suitcase.

In order to effectuate the Fourth Amendment's guarantee of freedom from unreasonable searches and seizures, this Court long ago conferred upon defendants in federal prosecutions the right, upon motion and proof, to have excluded from trial evidence which had been secured by means of an unlawful search and seizure. Weeks v. United States, 232 U.S. 383, 34 DS.Ct. 341, 58 L.Ed. 652. More recently, this Court has held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments * * *." Mapp v. Ohio, 367 U.S. 643, 657, 81

S.Ct. 1684, 1693, 6 L.Ed.2d 1081.

However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure. See, e.g., Jones v. United States, 362 U.S. 257, 260-261, 80 S.Ct. 725, 731, 4 L.Ed.2d 697. At one time a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of the seized property or that he had a possessory interest in the searched premises. In part to avoid having to resolve

the issue presented by this case, we relaxed those standing requirements in two alternative ways in Jones v. United States, supra. First, we held that when, as in Jones, possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence. Second, we held alternatively that the defendant need have no possessory interest in the searched premises in order to have standing; it is sufficient that he be legitimately on those premises when the search occurs. Throughout

this case, petitioner Garrett has justifiably, and without challenge from the Government, proceeded on the assumption that the standing requirements must be satisfied. On that premise, he contends that testimony given by a defendant to meet such requirements should not be admissible against him at trial on the question of guilt or innocence. We agree.

Under the standing rules set out in Jones, there will be occasions, even in prosecutions for non-possessory offenses, when a defendant's testimony will be needed to establish standing. This case serves as an example. Garrett evidently was not in Mrs. Mahon's house at the time

his suitcase was seized from her basement. The only, or at least the most natural, way in which he could find standing to object to the admission of the suitcase was to testify that he was its owner. Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim. Under the rule laid down by the courts below, he could give that testimony only by assuming the risk that the testimony would later be admitted against him at trial. Testimony of this kind, which links a defendant to evidence which the Government considers important enough to seize and to seek to have admitted at trial, must often be

highly prejudicial to a defendant. This case again serves as an example, for Garrett's admitted ownership of a suitcase which only a few hours after the robbery was found to contain money wrappers taken from the victimized bank was undoubtedly a strong piece of evidence against him. Without his testimony, the Government might have found it hard to prove that he was the owner of the suitcase.

The dilemma faced by defendants,

of not guilty. Heim v. United States, 47 App. D.C. 485, L.R.A. 1918E, 87; State v. Meyers, 99 Mo. 107, 119, 12 S.W. 516; People v. Ryan, 82 Cal. 617, 23 Pac. 121; Heath v. State, -Okla.Crim.Rep.-, 214 Pac. 1091. And see White v. State, 51 Ga. 286, 290; Green v. State, 40 Fla. 474, 478, 24 So. 537, 11 Am.Crim.Rep. 253. We think that contention is sound. A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just

consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. United States v. Bayaud, (C. C.) 23 Fed. 721. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. Com. v. Crapo, 212 Mass. 209, 98 N.E. 702. The court in exercise of its discretion will permit one accused to substitute a plea of

not guilty and have a trial if for any reason the granting of the privilege seems fair and just. Swang v. State, 2 Coldw. 212, 88 Am.Dec. 593; State v. Maresca, 85 Conn. 509, 83 Atl. 635; State v. Nicholas, 46 Mont. 470, 472, 128 Pac. 543; State v. Stephens, 71 Mo. 535; People v. McCrory, 41 Cal. 458, 461; State v. Coston, 113 La. 717, 720, 37 So. 619; Bishop, New Crim. Proc. §747.

The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled it

ceased to be evidence. By permitting it to be given weight the court reinstated it pro tanto. Heim v. United States, supra, 493 [47 App.D.C.]. The conflict was not avoided by the court's charge. Giving to the withdrawn plea any weight is in principle quite as inconsistent with the prior order as it would be to hold the plea conclusive. Under the charge, if the plea was found not improperly obtained, the jury was required to give it weight unless petitioner was shown to be innocent. And, if admissible at all, such plea inevitably must be considered. As a practical matter, it could not be received as evidence

without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial. Its introduction may have turned the scale against him. "The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty." White v. State, supra, 290 [51 Ga.]. It is beside the mark to say, as observed by the Circuit Court of Appeals, that petitioner knew better than anyone whether or not he was guilty and that under the evidence a plea of guilty was a reasonable thing. These suggestions might bear upon the

weight of admissible evidence but they have no relation to the admissibility of a withdrawn plea.

Courts frequently permit pleas of guilty to be withdrawn and pleas of not guilty to be substituted. We have cited all the decisions, State and Federal, which have come to our attention, that pass on the question here presented. The small number indicates that in this country it has not been customary to use withdrawn pleas as evidence of guilt. Counsel have cited no case, and we have found none, in which the questions has been considered in English courts.

We think the weight of reason is against the introduction in evidence

of a plea of guilty withdrawn on order of court granting leave and permitting the substitution of a plea of not guilty.

Judgment reversed.

Mr. Justice Stone concurs in the result.